Pemungut Duti Setem, Pulau Pinang v Malaysia Smelting Corp Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-40 OF 2011 (P)
ZULKEFLI CJ (MALAYA), HASHIM YUSOFF AND HASAN LAH FCJJ
9 FEBRUARY 2012

Revenue Law — Stamp duty — Sale and transfer of shares — Whether in valuing shares for stamp duty appellant had to take into consideration value of shares as stated in transfer form or actual value of shares on date of transfer

Rahman Hydraulic Tin Sdn Bhd, a private limited company with a paid-up capital of RM97,232,142 conducted an open tender exercise for the sale of its entire paid-up capital comprising of 97,232,142 ordinary shares of RM1 each ('the company's shares'). The respondent submitted a tender to purchase the company's shares at the tender price of RM15m. The respondent then submitted the share transfer form ('Form 32A') to the Deputy Collector of Stamp Duty ('the DC') for adjudication. The DC assessed the duty payable on the Form 32A as RM291,699 based on the total share value of RM97,232,142. The respondent objected to the assessment and contended that the assessment should be RM45,000 based on the consideration of RM15m. The respondent's objection was rejected by the DC. The respondent appealed to the High Court by way of case stated, but the High Court held that the stamp duty chargeable on the Form 32A would be RM291,699. The respondent then appealed to the Court of Appeal which allowed the appeal and held that the duty chargeable for the transfer of the company's shares was the consideration of RM15m paid by the respondent. The appellant was granted leave to proceed with the present appeal. The sole question for determination in this appeal was whether in valuing shares for stamp duty, the DC had to take into consideration the value of the shares as stated in the Form 32A or the actual value of the shares on the date of the transfer. It was the appellant's contention that stamp duty was imposed on the instrument and not on the transaction and that the Court of Appeal had misdirected itself in reversing the findings of the High Court.

Held, dismissing the appeal with costs of RM15,000:

(1) The par value of RM1 as stated in the Form 32A in the present case was not indicative of the actual value of the shares for the purpose of ascertaining stamp duty. This court agreed with the Court of Appeal's finding that the par value was not the actual value of the company's shares at the date of the transfer of the shares. This was because that par value was only a face value while the value of the company would wax and wane

according to many factors such as performance and outlook. In the present case the par value of RM1 per share did not represent the actual value of the company's shares because at the date of the transfer of the shares the company had accumulated losses (see paras 8–10).

(2) In the present case the tender and the subsequent sale of the company shares to the respondent were based on the company's balance sheet for the financial year ended 2003. Based on this balance sheet, the value of the shares using any method of valuation would be nil as the total liabilities of the company exceeded its total assets (see para 12).

(3) In the present case the Court of Appeal was right in holding that the best available evidence of the value of the company's shares on the date of the transfer of the shares was the purchase price of RM15m as stated in the Form 32A. Further, the fact that there was an open tender exercise and pursuant to that exercise the bid of RM15m was accepted would indicate that the purchase price represented the market value of the company's shares. In any event, as the purchase price of RM15m was higher than the value of the shares based on the balance sheet, the stamp duty would be assessed on the purchase price. Therefore the stamp duty payable on the Form 32A would be based on the sale consideration of RM15m (see paras 13–14).

[Bahasa Malaysia summary

Rahman Hydraulic Tin Sdn Bhd, syarikat sendirian berhad dengan modal berbayar sebanyak RM97,232,142 menjalankan pelaksanaan tender terbuka untuk jualan modal berbayar keseluruhannya yang terdiri daripada saham biasa sebanyak 97,232,142 yang bernilai RM1 setiap satu ('saham-saham syarikat'). Responden memasukkan tender untuk membeli saham-saham syarikat pada harga tender sejumlah RM15 juta. Responden kemudiannya menyerahkan borang pemindahan saham ('Borang 32A') kepada Timbalan Pemungut Duti Setem ('TP') untuk penghakiman. TP menilaikan duti berbayar atas Borang Form 32A sebagai RM291,699 berdasarkan nilai saham keseluruhan berjumlah RM97,232,142. Responden membantah terhadap penilaian tersebut dan berhujah bahawa penilaian sepatutnya adalah RM45,000 berdasarkan balasan sejumlah RM15 juta. Bantahan responden ditolak oleh TP. Responden merayu kepada Mahkamah Tinggi melalui kes yang dinyatakan, tetapi Mahkamah Tinggi memutuskan bahawa duti setem yang dikenakan cukai atas Borang 32A adalah RM291,699. Responden kemudiannya merayu kepada Mahkamah Rayuan yang membenarkan rayuan dan memutuskan bahawa duti yang dikenakan cukai untuk pemindahan saham-saham syarikat adalah balasan sejumlah RM15 juta yang dibayar oleh responden. Perayu diberikan izin untuk meneruskan dengan rayuan ini. Satu-satunya soalan untuk penentuan dalam rayuan ini adalah sama ada dalam menilai saham-saham untuk duti setem, TP hendaklah mempertimbangkan nilai saham-saham seperti yang dinyatakan di dalam Borang 32A atau nilai

A sebenar saham-saham atas tarikh pemindahan tersebut. Ia adalah hujahan perayu bahawa duti setem dikenakan atas faktor tersebut dan bukan atas transaksi dan bahawa Mahkamah Rayuan telah salah arah dirinya dalam mengakas dapatan Mahkamah Tinggi.

B **Diputuskan**, menolak rayuan dengan kos RM15,000:

(1) Nilai tara RM1 seperti yang dinyatakan dalam Borang 32A dalam kes ini tidak menunjukkan nilai sebenar saham-saham untuk tujuan memastikan duti setem. Mahkamah ini bersetuju dengan dapatan
C Mahkamah Rayuan bahawa nilai tara bukan nilai sebenar saham-saham syarikat pada tarikh pemindahan saham-saham tersebut. Ini adalah kerana bahawa nilai tara hanya nilai muka sementara nilai syarikat akan meningkat dan menurun mengikut banyak faktor seperti pencapaian dan pandangan. Dalam kes ini nilai tara RM1 setiap saham tidak
D mewakili nilai sebenar saham-saham syarikat kerana pada tarikh pemindahan saham-saham tersebut syarikat mempunyai kerugian terkumpul (lihat perenggan 8–10).

(2) Dalam kes ini tender dan jualan selanjutnya saham-saham syarikat kepada responden adalah berdasarkan kunci kira-kira syarikat untuk
E tahun kewangan berakhir 2003. Berdasarkan kunci kira-kira ini, nilai saham-saham menggunakan apa-apa cara penilaian akan menjadi kosong memandangkan liabiliti keseluruhan syarikat melebihi jumlah keseluruhan asetnya (lihat perenggan 12).

F (3) Dalam kes ini Mahkamah Rayuan adalah betul dalam memutuskan bahawa keterangan terbaik yang ada mengenai nilai saham-saham syarikat pada tarikh pemindahan saham-saham adalah harga belian RM15 juta tersebut seperti dinyatakan di dalam Borang 32A. Selanjutnya, fakta bahawa terdapat pelaksanaan tender terbuka dan
G berikutan pelaksanaan tersebut tawaran RM15juta diterima akan menunjukkan bahawa harga belian tersebut mewakili nilai pasaran saham-saham syarikat. Walau bagaimanapun, memandangkan harga belian RM15 juta lebih tinggi daripada nilai saham-saham berdasarkan kunci kira-kira, duti setem akan dinilaikan atas harga belian. Oleh itu
H duti setem berbayar atas Borang 32A akan berdasarkan balasan jualan RM15 juta (lihat perenggan 13–14).]

Notes

For cases on stamp duty in general, see 10 *Mallal's Digest* (2011 Ed Reissue)
I paras 2796–2867.

Cases referred to

BASF Services (M) Sdn Bhd v Pemungut Duti Setem [2010] 4 MLJ 596; [2010] 5 CLJ 109, FC (refd)

New Zealand case of Hatrick v Commissioner of Inland Revenue (1963) NZLR 641, CA (refd)

Union of India v Kulu Valley Transport Ltd & Ors (1958) 28 Com Cas 29 Punjab, HC (refd)

Legislation referred to

Companies Act 1965 s 103(1), Form 32A
Pengurusan Danaharta Nasional Berhad Act 1998
Stamp Act 1949 ss 13(1), 36(1), 39(1), First Schedule, Item 32(b), Form 32A

Appeal from: Civil Appeal No P1–01–105 of 2007 (Court of Appeal, Putrajaya)

Norhisham bin Ahmad (Noor Faezah bt Zainudin with him) (Inland Revenue Board) for the appellant.
Ghazi Ishak (G Arumugam with him) (Ghazi & Lim) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal in allowing the respondent's appeal against the decision of the High Court at Penang in dismissing the respondent's appeal on a case stated from the decision of Deputy Collector of Stamp Duty in respect of stamp duty payable on the sale and transfer of shares to the respondent under Item 32(b) of the Stamp Act 1949 ('the Act').

BACKGROUND FACTS

[2] The relevant background facts leading to the present appeal before this court are as follows:

(a) Rahman Hydraulic Tin Sdn Bhd ('the company') is a private limited company with a paid-up capital of RM97,232,142 comprising of 97,232,142 ordinary shares of RM1 each;

(b) under a workout proposal pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998, the entire paid-up share capital of the company was held by Anggun Pintas Sdn Bhd ('the vendor');

(c) the vendor then conducted an open tender exercise for the sale of the entire paid-up capital of the company comprising 97,232,142 ordinary shares of RM1 each ('the company's shares');

(d) this tender and sale was subject to the condition that only the mining

assets and liabilities would remain with the company after the sale. The non-mining assets and liabilities would be transferred to the vendor;

(e) the respondent submitted a tender to purchase the company's shares from the vendor at the tender price of RM15,000,000;

(f) the share sale agreement provided that all assets (excluding the mining rights and the related assets) of the company shall be transferred to the vendor on/before the completion date;

(g) the respondent then submitted to the Deputy Collector of Stamp Act 1949 for adjudication under s 36(1) of the Act, the share transfer form issued under s 103(1) of the Companies Act 1965 ('Form 32A') dated 22 November 2004 transferring 97,232,142 ordinary shares of RM1 each from the vendor to the respondent at the consideration sum of RM15,000,000;

(h) The Deputy Collector of Stamp Duty assessed the duty payable on the Form 32A under item 32(b) of the First Schedule of the Stamp Act 1949 as RM291,699 based on the par value of the said shares of RM97,232,142;

(i) the respondent objected to the assessment and contended that the assessment should be RM45,000 based on the consideration of RM15,000,000. The respondent's objection was rejected by the Deputy Collector of Stamp Duty; and

(j) the respondent having paid the stamp duty of RM291,699 as required by s 39(1) of the Act filed an appeal in the High Court at Penang against the decision of the Deputy Collector of Stamp Duty by way of case stated pursuant to s 39 of the Act.

FINDINGS OF THE HIGH COURT

[3] On appeal by way of case stated the following three questions were posed for the opinion of the High Court:

(a) whether the par value of RM1 per share (or RM97,232,142 for the entire paid-up capital) of Rahman Hydraulic Tin Sdn Bhd ('the company') is the actual value of the company's shares at the date of the transfer?;

(b) if not, what is the value of the company's shares at the date of the transfer?; and

(c) what is the duty chargeable on the Form 32A dated 22 November 2004 for the transfer of the 97,232,142 ordinary shares of the company at the consideration of RM15,000,000?

[4] The learned judge of the High Court answered the first question in the

affirmative, holding that the par value of RM1 per share was the actual value for the company's shares at the date of the transfer and that therefore, in answer to the third question, the duty chargeable on the Form 32A would be RM291,699 based on the total share value of RM97,232,142.

FINDINGS OF THE COURT OF APPEAL

[5] On appeal the Court of Appeal unanimously allowed the appeal and answered the three questions posed before the High Court as follows:

(a) that the par value of RM1 per share (or RM97,232,142 for the entire paid-up capital) of the company was not the actual value of the company's shares at the date of the transfer;

(b) that the best available evidence of value of the company's shares at the date of the transfer was the purchase price of RM15,000,000; and

(c) the duty chargeable on the share transfer form dated 22 November 2004 for the transfer of the 97,232,142 ordinary shares of the company at the consideration of RM15,000,000 was RM45,000.

LEAVE TO APPEAL

[6] The appellant was granted leave to appeal by this court against the decision of the Court of Appeal on the following question:

> Whether the value of RM1 per share as stated in the transfer form dated 22 November 2004 or value for the share based on the balance sheet for the financial year ended December 2003, is the value of the company's share on the date of transfer for the purpose of ascertaining stamp duty payable in respect of transfer of share under Item 32(b) of the Stamp Act 1949.

DECISION

[7] Learned counsel for the appellant before us had forcibly argued that the Court of Appeal judges in reversing the findings of the High Court had misdirected themselves by failing to consider the principle of stamp duty wherein stamp duty is imposed on the instrument and not on the transaction. The case of *BASF Services (M) Sdn Bhd v Pemungut Duti Setem* [2010] 4 MLJ 596; [2010] 5 CLJ 109 was cited as the authority for such a proposition. It is the appellant's contention that to determine the value of shares on the date of transfer, the value of shares as indicated in the Form 32A is the correct value of the shares for stamp duty purposes. On this point we are mindful of the fact that stamp duty is imposed on the instrument and not on the transaction. However, in the context of the present case the contents of the instrument

Form 32A must be closely examined in ascertaining the stamp duty payable in respect of transfer of shares under item 32(b) of the Act.

[8] We are of the view the par value of RM1 as stated in Form 32A in the present case is not indicative of the actual value of the shares for the purpose of ascertaining stamp duty. The said Form 32A does not state that the value of the share is RM1 per share. The phrase 'Ordinary Shares of RM1.00 each' appears in the column entitled 'Description of Securities' in the said Form 32A and this is only a description of the shares. The words 'Ordinary Shares of RM1.00 each' is the usual form of describing shares and the 'RM1.00' refers to the par value of the shares.

[9] Furthermore, it is noted that if the appellant's contention is accepted, it would mean that in all cases, the stamp duty on the transfer of shares would be based on the par value stated in the Form 32A or the price, whichever is the higher. However, it is noted that the appellant itself under its guidelines on the stamping of share transfer instruments for shares that are not quoted on the Kuala Lumpur Stock Exchange ('KLSE') compares not just the par value with the price but also takes into account the net tangible asset, which is a value that does not appear in the share transfer form at all.

[10] We are also of the view the par value is not the actual value of the shares. We are in agreement with the findings of the Court of Appeal when in answering the first of three questions posed, it held that the par value is not the actual value of the shares at the date of the transfer for the reason that par value is only a face value while the value of the company waxes and wanes, amongst other things, according to its performance and outlook. The par value may represent the actual value or true value of the shares on the date the shares were first issued (*provided that the shares were not issued at a premium*) but once the company starts carrying on business, the par value would no longer reflect the actual value of the shares as the company may have made profits or incurred losses or the assets of the company may have appreciated or depreciated. In the case of the respondent here the par value of RM1 per share (*or RM97,232,142 for the entire paid-up capita*l) does not represent the actual value of the company's shares at the date of the transfer on 22 November 2004 because by then the company had accumulated losses amounting to RM418,020,000 and its net tangible asset was in a deficit of RM311,683,000.

[11] It is noted that in both items s 32(b) of the First Schedule of the Act and s 13(1) of the Act the phrase 'par value' is not used. In comparison, item 71 of the First Schedule of the Act which provides for the stamp duty payable on 'share warrant or stock certificate to bearer' specifically refers to 'the nominal value of the shares or stock specified in the warrant'. As stated in *Black's Law Dictionary*, (8th Ed), 'nominal value' is another term of 'par value'. On the

same point in the Indian case of *Union of India v Kulu Valley Transport Ltd & Ors* (1958) 28 Com Cas 29 Punjab, the High Court, inter alia, held:

> The phrase 'value of the shares' cannot be read as 'face value of the shares'. If that were the intention of the Legislature, it could have been precisely expressed by using a slightly different language.

[12] On one of the methods of valuation of the shares, in the New Zealand case of *Hatrick v Commissioner of Inland Revenue* (1963) NZLR 641, the Court of Appeal therein opined that in valuing shares for stamp duty, the task of the commissioner is to ascertain the true value of the shares, namely what a purchaser desiring to purchase the shares would have had to pay for them on the relevant date to a vendor wiling but not anxious to sell. The said Court of Appeal also identified another method of valuing the shares by stating that if the shares are quoted in the stock exchange, the market value of the shares would be the price they are fetching at the relevant time. This indicates that it is the actual value and not the par value of the shares which is relevant for the purpose of ascertaining stamp duty. For the present case in applying the method of valuation of the shares, the figures from the company's balance sheet for financial year ended December 2003 would be relevant as the tender and the subsequent sale of the shares in the company to the respondent was based on this balance sheet. Based on this balance sheet, the value of the shares using any of the method of valuation would be nil as the total liabilities of the company of RM351,560,000 exceeded the total assets of RM39,877,000.

[13] Although the Form 32A was dated 22 November 2004 we are of the view the Court of Appeal was right in holding that there being no evidence that the value of the shares at the date of transfer was more than at the time of the purchase, and given that there was no dispute raised whether the open tender sale was at arm's length or not, the best available evidence of the value of the shares of the company on the date of the transfer is the purchase price of RM15,000,000. In the case of *Union of India v Kulu Valley Transport Ltd & Ors*, the court after holding that 'value of the shares' cannot be read as 'face-value of the shares' went on to hold that the consideration paid for the shares can be taken to be the value. This is what the court said:

> The consideration actually paid or agreed to be paid can safely be regarded as the value of the shares. So long as there is nothing to indicate that the consideration was not truly stated in the transfer, the one mentioned therein shall be accepted as the consideration that was, or is, to be paid.

[14] In the present case there is no suggestion that the consideration is anything other than the RM15,000,000 stated in the Form 32A. Furthermore, the manner in which the consideration price was arrived at itself would indicate that it represents the market value of the company's shares. There was an open

tender exercise and pursuant to that exercise the appellant's bid of RM15,000,000 was accepted. In any event, as the purchase price of RM15,000,000 is higher than the value of the shares based on the balance sheet, pursuant to Item 32(b) of the Act, the stamp duty would be assessed on the purchase price. In the circumstances it is our judgment that the value of the shares based on the balance sheet for the financial year ended December 2003 is the value to the company's shares on the date of the transfer for the purpose of ascertaining stamp duty payable in respect of transfer of share under Item 32(b) of the Stamp Act 1949. Therefore, the stamp duty payable on the Form 32A would be based on the sale consideration of RM15,000,000.

CONCLUSION

[15] For the reasons abovestated we would dismiss the appellant's appeal with costs. We award a sum of RM15,000 as costs to the respondent. The deposit is to be paid to the respondent towards costs.

Appeal dismissed with costs of RM15,000.

Reported by Kohila Nesan